

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JESSE MANN,

Plaintiff,

v.

DR. C. LEE, et al.,

Defendants.

) No. C 07-0781 MMC (PR)

) **ORDER OF SERVICE; DIRECTING**
) **DEFENDANTS TO FILE**
) **DISPOSITIVE MOTION OR NOTICE**
) **REGARDING SUCH MOTION**

On February 6, 2007, plaintiff, a California prisoner currently incarcerated at Salinas Valley State Prison ("SVSP") and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983 against various SVSP employees. By separate order filed concurrently herewith, plaintiff has been granted leave to proceed in forma pauperis.

DISCUSSION

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42,

48 (1988).

Having reviewed the complaint, the Court finds plaintiff's allegations, liberally construed, state a cognizable claim that defendants violated his Eighth Amendment rights by acting with deliberate indifference to his serious medical needs.

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all attachments thereto, and a copy of this order upon **Health Care Manager Dr. Charles Lee, Dr. Bowman, and Dr. Milner at Salinas Valley State Prison.** The Clerk shall also mail courtesy copies of the complaint and this order to the California Attorney General's Office.

2. No later than **ninety (90) days** from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the amended complaint found to be cognizable above.

a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810 (2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.**

3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than **thirty (30) days** from the date defendants' motion is filed.

a. In the event the defendants file an unenumerated motion to dismiss

1 under Rule 12(b), plaintiff is hereby cautioned as follows:¹

2 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
3 the Federal Rules of Civil Procedure, on the ground you have not exhausted
4 your administrative remedies. The motion will, if granted, result in the
5 dismissal of your case. When a party you are suing makes a motion to dismiss
6 for failure to exhaust, and that motion is properly supported by declarations (or
7 other sworn testimony) and/or documents, you may not simply rely on what
8 your complaint says. Instead, you must set out specific facts in declarations,
9 depositions, answers to interrogatories, or documents, that contradict the facts
10 shown in the defendant's declarations and documents and show that you have
11 in fact exhausted your claims. If you do not submit your own evidence in
12 opposition, the motion to dismiss, if appropriate, may be granted and the case
13 dismissed.

14 b. In the event defendants file a motion for summary judgment, the Ninth Circuit
15 has held that the following notice should be given to plaintiffs:

16 The defendants have made a motion for summary judgment by which
17 they seek to have your case dismissed. A motion for summary judgment under
18 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

19 Rule 56 tells you what you must do in order to oppose a motion for
20 summary judgment. Generally, summary judgment must be granted when there
21 is no genuine issue of material fact--that is, if there is no real dispute about any
22 fact that would affect the result of your case, the party who asked for summary
23 judgment is entitled to judgment as a matter of law, which will end your case.
24 When a party you are suing makes a motion for summary judgment that is
25 properly supported by declarations (or other sworn testimony), you cannot
26 simply rely on what your complaint says. Instead, you must set out specific
27 facts in declarations, depositions, answers to interrogatories, or authenticated
28 documents, as provided in Rule 56(e), that contradict the facts shown in the
defendants' declarations and documents and show that there is a genuine issue
of material fact for trial. If you do not submit your own evidence in opposition,
summary judgment, if appropriate, may be entered against you. If summary
judgment is granted in favor of defendants, your case will be dismissed and
there will be no trial.

20 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
21 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.
22 317 (1986) (holding party opposing summary judgment must come forward with evidence
23 showing triable issues of material fact on every essential element of his claim). Plaintiff is
24 cautioned that failure to file an opposition to defendants' motion for summary judgment may
25 be deemed to be a consent by plaintiff to the granting of the motion, and granting of

27 ¹The following notice is adapted from the summary judgment notice to be given to pro
28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.
2 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

3 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
4 plaintiff's opposition is filed.

5 5. The motion shall be deemed submitted as of the date the reply brief is due. No
6 hearing will be held on the motion unless the Court so orders at a later date.

7 6. All communications by the plaintiff with the Court must be served on
8 defendants, or defendants' counsel once counsel has been designated, by mailing a true copy
9 of the document to defendants or defendants' counsel.


10 7. Discovery may be taken in accordance with the Federal Rules of Civil
11 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
12 Rule 16-1 is required before the parties may conduct discovery.

13 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
14 Court informed of any change of address and must comply with the court's orders in a timely
15 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
16 pursuant to Federal Rule of Civil Procedure 41(b).

17 9. Any motion for an extension of time must be filed no later than the deadline
18 sought to be extended and must be accompanied by a showing of good cause.

19 IT IS SO ORDERED.

20 DATED: May 29, 2007

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22 MAXINE M. CHESNEY
23 United States District Judge
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